United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

76-7633

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

ROBERT HIGH,

Plaintiff-Appellant,

—v.—

SABENA BELGIAN WORLD AIRLINES,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANT

+ Appendix

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STATEMENT OF THE ISSUES

I. WHETHER THE PLAINTIFF HAS SUFFICIENTLY STATED IN HIS COMPLAINT A CAUSE OF ACTION UNDER THE "DUTY OF FAIR REPRESENTATION" OWED TO HIM BY THE DEFENDANT THROUGH THE OPERATION OF 45 U.S.C. §§ 151.?

II. WHETHER THE PLAINTIFF,HAS AT PRESENT,AN EMPLOYMENT STATUS INFERIOR TO WHITE CO-WORKERS WHO APPLIED FOR EMPLOYMENT CONTEMPORANEOUSLY WITH HIM BECAUSE OF THEIR RACE,HAVE SUFFICIENTLY ALLEGED CONTINUING VIOLATIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964,42 U.S.C. §§ 2000e.?

III. WHETHER THE PLAINTIFF,HAVING ALLEGED PRESENT HARM TO HIMSELF IN THE DEFENDANT COMPANY'S EMPLOY RESULTING FROM THE OPERATION OF THE DEFENDANT'S EXCLUSIONARY PRACTICES,HAVE SUFFICIENTLY ALLEGED ACTS OF RACIAL DISCRIMINATION OCCURRING WITHIN THE APPICABLE STATUTE OF 42 U.S.C. §§ 1981?

STATEMENT OF THE CASE

THIS IS AN APPEAL FROM AN ACTION BROUGHT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §§ 2000e, THE CIVIL RIGHTS ACT OF 1866, 42 U.S.C. §§ 151. THE ACTION WAS BROUGHT BEFORE THE HONORABLE JUDGE JOHN DOOLING OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK.

THE PLAINTIFF IS A BLACK MAN EMPLOYED BY THE DEFENDANT,SABENA BELGIAN WORLD AIRLINES (HEREAFTER REFERRED TO AS DEFENDANT),THE PLAINTIFF CHALLENGES THE PRESENT RACIALLY DISCRIMINATORY HIRING PRACTICES OF THE AIRLINE.HE IS SEEKING ON BEHALF OF HIMSELF AND OTHER MINORITIES ADJUSTMENTS UNDER TITLE VII,AND ANY OTHER EQUITABLE RELIEF.

PROCEEDINGS BELOW

PLAINTIFF FIRST FILED CHARGES WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ON FEB.24,1971 ON JAN.29,1975 EEOC FOUND THE DEFENDANT GUILTY OF VIOLATING PLAINTIFF'S RIGHTS UNDER TITLE VII. ON JULY 25,1975,THE PLAINTIFF WAS ISSUED A NOTICE OF RIGHT TO SUE FROM THE EEOC OFFICE.THIS SUIT WAS FILED IN THE DISTRICT COURT ON OCT.23,1975.

AN AMENDED COMPLAINT WAS FILED ON FEB.13,1976 AND A MOTION TO DISMISS THE COMPLAINT WAS SUBSEQUENTLY FILED BY THE DEFENDANT.IN A DECISION DATED APRIL 12,1976 THE COURT BELOW DENIED THE MOTION TO DISMISS FOR LACK OF JURISDICTION AND OTHER GROUNDS.

ON OCT.12,1976,TRIAL WAS HELD IN DISTRICT COURT, ON NOV.19,1976 THE COURT BELOW RULED THAT THE ACTION IS DISMISSED ON THE MERITS.

STATEMENT OF THE FACTS

FROM THE TIME DEFENDANT BEGAN DOING BUSINESS IN THE UNITED STATES UNTIL THE PRESENT, IT HAS DISCRIMINATED AGAINST BLACKS FOR HIRE AND PROMOTIONAL OPPORTUNITIES. DEFENDANT 1975 EEO-1 REPORT TO THE GOVERNMENT, STATES 119 EMPLOYEES AT KENNEDY AIRPORT. ONLY 4 ARE BLACK AND THE 4 WORK IN THE CARGO DEPT. THEY WERE HIRED AFTER JULY 2, 1965 THE EFFECTIVE DATE OF TITLE VII.

SINCE THE DEFENDANT MAINTAINED AN ABSOLUTE COLOR BAR BOTH PRIOR TO AND SUBSEQUENT TO THE EFFECTIVE DATE OF TITLE VII, NO BLACK HAS MANAGED UNDER THE COLLECTIVE BARGAINING AGREEMENT, TO RISE ABOVE THE POSITION OF CARGO AGENT.

THE FACTS SHOW PLAINTIFF TO BE OF IMPECCABLE REPUTATION. HE RECEIVED AN AWARD FROM THE AIRPORT SECURITY COUNCIL, WHICH DEFENDANT IS A MEMBER, FOR PREVENTION OF CRIME IN THE CARGO DEPT. OF KENNEDY AIRPORT. (PL. EX. 8) HE RECEIVED AN HONORABLE DISCHARGE FROM THE U.S. MARINE CORPS, ATTENDED BOSTON UNIV. AND JOHN JAY COLLEGE OF CRIMINAL JUSTICE.

PLAINTIFF BEGAN HIS EMPLOYMENT WITH DEFENDANT ON SEPT.26,1968.BETWEEN 1968 AND MID 1970,BEFORE MR.INNES AND MR.GLYNN ARRIVED AT DEFENDANT COMPANY,PLAINTIFF HAD NO TROUBLE WITH DEFENDANT.MR.INNES WAS HIRED AS THE CARGO MANAGER AND MR.GLYNN AS THE PERSONNEL MANAGER. WITHIN 30 DAYS AFTER MR.INNES TOOK OVER PLAINTIFF WAS FIRST AND LAST TO BE GIVEN AN HONESTY TEST.AN EXTRA PIECE OF CARGO WAS PLANTED ON HIS TRUCK TO TEST ONES REACTION.THE RATIONAL WAS A THIEF WOULD KEEP THE CARGO AND A HONEST PERSON WOULD RETURN IT.PLAINTIFF DID RETURN IT AND THAT POLICY WAS DISCONTINUED. EEOC INVESTIGATORS COULD NOT FIND ANYONE ELSE WHO WAS SO TESTED.

IN OCT.1970 PLAINTIFF AND MR.BECTON,ANOTHER BLACK CO - WORKER,MR.GLYNN THE PERSONNEL MGR.AND MR.JOHNSON THE DIRECTOR OF THE JAMAICA ANTI-PROVERTY COMMITTEE,MET TO ASK DEFENDANT IF HE COULD RECRUIT SOME MINORITIES.

FROM THAT POINT ON -THE DIE WAS CAST

TWO MONTHS AFTER THE MEETING PLAINTIFF WAS INTERROGATED BY THE U.S.CUSTOMS SPECIAL AGENTS,IN REFERENCE TO A MISSING SHIPMENT.TWO MONTHS AFTER THAT PLAINTIFF WAS INTERROGATED BY THE F.B.I. IN REFERENCE TO THE SAME MISSING SHIPMENT.THE AGENTS INFORMED PLAINTIFF THAT THE DEFENDANT GAVE YOUR NAME AS A SUSPECT.PLAINTIFF WAS ALSO INFORMED BY MANAGEMENT THAT HE DID NOT PASS THE TEST FOR PROMOTION.ON FEB.24,1971 PLAINTIFF FILED EEOC CHARGES.

THE REQUIREMENT FOR FILING A EEOC CHARGE,IS TO FIRST FILE A STATE CHARGE OF DISCRIMINATION.THE NEW YORK STATE HUMAN RIGHTS COMMISSION (HEREIN AFTER CALLED NYSHRC)CHARGE WAS FILED THE SAME DAY AS WAS THE EEOC CHARGE FEB.24,1971,TO MEET THE REQUIREMENT.PLAINTIFF WAS RELUCTANT TO FILE WITH THE NYSHRC,AFTER WHAT HAPPENED TO TWO OTHER BLACK EMPLOYEES WHO FILED COMPLAINT WITH THAT AGENCY PRIOR TO PLAINTIFF EMPLOYMENT WITH DEFENDANT. MR.WALTER CHRISTEN AND MR.OMEE JONES BOTH BLACK,FILED SEPERATE AND INDIVIDUAL CHARGES,THE STATE RULED NO PROBABLE CAUSE IN BOTH CASES.

ON MAY 14,1971,THE NYSHRC RULED NO PROBABLE CAUSE IN MY COMPLAINT ALSO.ON MAY 17,1971 PLAINTIFF WAS SUSPENDED FROM WORK IN A STRONGLY WORDED TELEGRAM (DEFT EX.H) ON THE PRETEXT OF A BAD ATTENDANCE RECORD.

PLAINTIFF APPEALED THE NYSHRC DECISION,ON MARCH 21,1972 THE DECISION WAS REAFFIRMED,BY THE APPEAL BROAD. THE DAY AFTER THAT DECISION PLAINTIFF WAS CHARGED BY A SUPERVISOR MR.PALMENTO.THIS CHARGE WAS WITHIN THE UNION AND INVOLVED UNION MEMBERS ONLY.THIS ACTION RESULTED IN HAVING THE PLAINTIFF FINED AND SUSPENED FROM THE LOCAL UNION.

UNION ERRONEOUSLY SUSPENDED PLAINTIFF ON MAY 15,1972. DEFENDANT REALIZING PLAINTIFF HAD NO UNION PROTECTION ATTEMPTED TO CAPITALIZE ON THE SUSPENSION,ON MAY 18,1972 ONLY TWO DAYS LATER,FIRED THE PLAINTIFF.

AGAIN THE REASON GIVEN FOR DISCHARGE WAS BAD ATTENDANCE.AT THAT SAME POINT IN TIME,18 WHITE EMPLOYEES IN THE SAME DEPT.HAD WORST ATTENDANCE RECORDS THAN THAT OF PLAINTIFF.(pl.ex.7)

PLAINTIFF WENT TO THE INTERNATIONAL HEADQUARTERS OF THE UNION AND EXPLAINED THE CASE.THE HEADQUARTERS, REALIZING THE CONSPIRACY IMMEDIATELY REINSTATED PLAINTIFF TO THE LOCAL UNION,CANCELLED THE FINE AND INSTRUCTED THE UNION TO HIRE AN ATTORNEY TO PROCESS THE GRIEVANCE OF PLAINTIFF UNTIL HE GETS HIS JOB BACK.SUPERVISOR PALMENTO WAS REPRIMANDED FOR FILING A FALSE CHARGE AGAINST PLAINTIFF WITH THE UNION.

DEFENDANT HAVING LEARNED OF PLAINTIFF REINSTATEMENT WITH THE UNION REQUESTED A MEETING WITH UNION CHAIRMAN MR.A.BERNSTEIN.

(FOLLOWING IS MR.BERNSTEIN'S TESTIMONY AT THE TRIAL)

(THE FOLLOWING IS AN EXCERPT OF THE DIRECT EXAMINATION OF MR.A.BERNSTEIN BY MR.TARNOW)

Q. DID THERE COME A TIME WHEN YOU HAD A MEETING WITH MR.INNES?

A. WELL LET ME PUT IT TO YOU THIS WAY,IT NEVER REALLY STARTED OUT TO BE A MEETING,ALL IT STARTED OUT TO BE WAS A LUNCH WITH MR.SHARMA AND IT ENDED WITH MR.LENON AND MR.INNES JOINING THE PARTY.

WHEN WE GOT TO THE RESTAURANT WE SAT DOWN AND TALKED.ALL OF A SUDDEN THE CONVERSATION CAME CAME ON TO THE GRIEVANCES THAT I'VE HAD. THEY WANTED ME TO WITHDRAW THE GRIEVANCES AND I TOLD THEM I COULDN'T.ONE WORD LED TO ANOTHER AND THEY STARTED OFF WITH THE GOODS THAT THEY COULD,YOU KNOW,THAT WAS IN THEIR POWER,ALL THE GOODS,YOU KNOW,THEY SORT OF WANTED ME TO---THEY MAKE SURE I WOULD REMAIN THE CHAIRMAN FOR THE REST OF MY TERM AT SABENA,THEY HAVE ALL THE GOODS,AND I COULDN'T SAY HE IN FACT --- ONE OF THE MANAGERS SAID, " DON'T YOU WANT TO RIDE THE BAND WAGON " I SAID, " NO "

WELL, IT SEEMED THAT MR.LENON AND MR.SHARMA LEFT AND IT WAS JUST MR.INNESS AND I SITTING AT THE TABLE.

ONE WORD LED TO ANOTHER AND,WELL,YOU KNOW,THAT'S HOW THE STORY GOES.HE TOOK THE FIRST SWING AND I TOOK THE SECOND.BEFORE I KNOW IT I WAS,YOU KNOW, ITS A SAD THING TO HAPPEN.BUT,I STILL WOULDN'T GIVE IN.

Q. YOU WOULDN'T WITHDRAW THAT GRIEVANCE ?

A. THESE ARE MY BUDDIES,I WORK WITH THEM. HOW CAN I WITHDRAW ANY GRIEVANCE.SO,THAT'S THE END OF THAT.

I BELIEVE THAT AT THAT PARTICULAR TIME WHEN I FIRST FILED THE GRIEVANCE I REALLY DIDN'T THINK WE HAD MUCH OF A CHANCE,BUT ONCE THEY STARTED THROWING THE GOODS AT ME,I KNOW THEY DIDN'T HAVE A CASE AND WE WOULD ----

Q. YOU WON HANDS DOWN,DIDN'T YOU ?

A.YES

Q. EVERYTHING LOCK,STOCK AND BARREL ?

A. YEAH,THANK GOD FOR THAT,MR.GUTMAN---

Q. HE WAS HARD PRESSED TO HOLD A FIVE AND ONE-HALF DAYS' ABSENCE AND DISCHARGE A MAN ?

A. THAT'S WHAT I CAN'T UNDERSTAND ABOUT THIS COMPANY.

IN VIEW OF THE PENDING EEOC COMPLAINT FILED IN 1971 BY THE PLAINTIFF,DEFENDANT ATTEMPTED TO COVER - UP THE DISCHARGE OF PLAINTIFF,ON MAY 18,72 BY DISCHARGING A WHITE EMPLOYEE ON THE SAME DAY. A MR.ROVECCIO,WHO WAS A ACTIVE UNION SHOP STEWARD THERE ARE NO SIMILARITES IN THE RECORDS OF PLAINTIFF AND MR.ROVECCIO TO JUSTIFY DISCHARGE ON THE SAME DAY. (EX.B)

PLAINTIFF ATTENDANCE RECORD WAS IMPROVING AT THE RATE OF 25 % PER YEAR SINCE 1969,YET HE WAS DISCHARGED.

DEFENDANT MAKES INFERENCE TO PLAINTIFF TAKING ONE AND TWO DAYS ABSENCES FOLLOWED OR PRECEDED PAID HOLIDAYS. THERE IS NO EVIDENCE IN THE OPINION OF THE ARBITRATOR (ex.A) NOR COULD DEFENDANT GIVE ANY DATES AS TO WHICH HOLIDAYS HE WAS REFERING TO IN THE COURT BELOW.

AFTER PLAINTIFF DISCHARGE ON MAY 18,1972,HE WAS BLACKLISTED FROM THE AIRLINE INDUSTRY AND UNABLE TO FIND A JOB.DEFENDANT ALSO REFUSED TO ALLOW PLAINTIFF TO COLLECT UNEMPLOYMENT INSURANCE. WITH NO INCOME PLAINTIFF TESTIFIED HE LOST HIS FURNITURE,APARTMENT AND AUTOMOBILE.

AFTER EIGHT MONTHS,DEFENDANT AND THE UNION FINALLY WENT TO ARBITRATION.AT THE END OF ARBITRATION JUDGE DANIAL GUTMAN RULED:

> "THAT THE GRIEVANT HIGH WAS DISCHARGED WITHOUT JUST CAUSE,THAT HE BE REINSTATED WITH THE COMPANY,THAT HE RECEIVE BACK PAY AND ALL SENIORITY RIGHTS" (EX.A)

PLAINTIFF WAS RESTORED TO DUTY ON JAN.10,1973.

DEFENDANT DISCRIMINATORY ACTS CONTINUED AFTER PLAINTIFF RETURNED TO WORK.

IN DEC.1974 DEFENDANT HELD ITS ANNUAL CHRISTMAS PARTY.IN A LOTTERY TYPE DRAWING,DEFENDANT DRAWS 38 FREE TICKETS DONATED BY OTHER AIRLINES. THE GRAND PRIZE BEING DEFENDANT'S OWN TICKETS AND LAND ACCOMMODATION.

AFTER EIGHT YEARS,PLAINTIFF FINALLY WON A TRIP, IT WAS THE DEFENDANT'S GRAND PRIZE.(EX.11 & 12) DEFENDANT REFUSED TO GIVE PLAINTIFF THE FULL PRIZE,HE ONLY RECEIVED THE ROUND TRIP AIR PORTION.

AT THE PARTY ITSELF,WINNER ARE ONLY GIVEN A NUMBER, THE TICKETS ARE MADE UP AND SENT OUT TWO WEEKS LATER. WHEN PLAINTIFF RECEIVED ONLY HALF THE PRIZE,HE DID NOT COMPLAINT,BELIEVING THAT MAYBE THE OTHER HALF WAS DISCONTINUED.THE NEXT YEAR 1975 A WHITE CO-WORKER WON THE SAME GRAND PRIZE OF DEFENDANT AND THE LAND ACCOMMODATION WERE INCLUDED IN HIS PRIZE AS WAS THE YEAR PRECEEDING 1973 WHEN ANOTHER CO-WORKER WON.

(THE FOLLOWING IS AN EXCERPT OF THE DIRECT EXAMINATION OF MR.SHARMA,BY MR.TARNOW)

Q. MR.SHARMA,DURING THE COURSE OF THE YEARS, MANY EMPLOYEES HAVE GOTTEN MARRIED,HAVEN'T THEY ?

A. MARRIED,YES,SIR.

Q. IS IT A POLICY OF YOUR COMPANY TO REQUIRE MARRIAGE CERTIFICATES ?

A. NOT BEFORE,BUT WE DID INSTITUTE IT LATELY.

Q. WHEN YOU SAY LATELY,WHEN IS LATELY ?

A. ABOUT SIX MONTHS AGO.

Q. WHO WAS THE FIRST INDIVIDUAL ?

A. MR.HIGH

AGAIN PLAINTIFF WAS THE FIRST TO COMPLY WITH A POLICY CHANGE.

IN THE CARGO DEPT.OVER THE LAST EIGHT YEARS PLAINTIFF KNOWS OF SEVEN MARRIAGES AMONG WHITE EMPLOYEES,WHO EVENTUALLY TOOK THEIR WIVES ON TRIPS WITH COMPANY PASSES.NOT ONE EVER HAD TO PRODUCE A MARRIAGE CERTIFICATE LIKE PLAINTIFF WAS DEMANDED TO DO.IT WAS NO QUESTION AS TO THEIR HONESTY,WHEN PLAINTIFF DECIDED TO GET MARRIED THE POLICY SUDDENLY CHANGED AND SUBJECTED TO THIS HARRASSMENT TWO DAYS BEFORE HIS MARRIAGE.

PLAINTIFF WAS PLANNING TO TAKE HIS WIFE AWAY FOR THE HONEYMOON,THE HARRASSMENT FORCED HIM TO CANCELL HIS PLANS.

(FOLLOWING IS AN EXCERPT OF THE TESTIMONY OF HUGO KRUEGER ON DIRECT EXAMINATION BY MR.TARNOW)

Q. YOU'VE HEARD MR.INNES TESTIMONY?

A. YES,I DID.

Q. HE INDICATED IT COULD BE A FAIR SUMMARY THAT MR.HIGH WAS ACTIVE IN CIVIL RIGHTS CAUSES AND MINORITY RIGHTS CAUSES,WOULD THAT BE CORRECT ?

A. THAT IS CORRECT.

Q. WHICH IS PRETTY WELL KNOWN AROUND THE PLANT ?

A. I WOULD SAY SO,YES.

Q. AND IN YOUR CONVERSATIONS WITH MR.INNES ,AS MANAGER,DID YOU GET AN OPINION AS TO WHAT HE THOUGHT ABOUT THESE ACTIVITIES ?

A. MR.INNES HAD A WAY OF NOT STATING THINGS SPECIFICALLY. PROBABLY IN ORDER NOT TO BE CUTE, BUT RATHER SO THAT HE WOULD GET RESPONSES WHICH HE LIKED OR THAT HE WOULD GET A POINT ACROSS WHICH HE KNEW COULD NOT BE MISUNDERSTOOD. YET, IT COULD NOT BE PINPOINTED. HE WAS VERY GOOD AT IT. HE ALWAYS HAD A DOMINANT PERSONALITY AND AND HE WANTED THINGS PRETTY MUCH HIS WAY.

ALL THE WAY DOWN THE LINE EVERYONE HAD TO FALL IN LINE.NOW HE DID THIS BE USING SUBTLETIES OR THREATS OR OUTRIGHT TERRORIZING,SAYING IF YOU WANTED TO GET SOMEBODY,ITS NOT DIFFICULT TO GET SOMEBODY.IT HAPPENS TO BE THE TRUTH.IF ONE IS PICKED OUT AT RANDOM HE CAN PICK HIM OFF AT HIS LEISURE. HIS APPROACH APPARENTLY WAS VERY SUCC-ESSFUL.

Q. WITH RESPECT TO MR.HIGH AND ANOTHER BLACK GENTLEMAN BY THE NAME OF MR.BECTON,WHAT WOULD BE YOUR OPINION IN THAT REGARD?

A. WELL THE WAY I SAW IT,MR.INNES WAS TRYING TO BUILD HIS OWN LITTLE KINGDOM,EVERYBODY HAD TO FALL IN LINE.IF YOU DID NOT WORK ACTIVELY WITH HIM,AT LEAST OFFERED NO RESISTANCE TO HIS OWN PARTICULAR PLANS,WHICH AFTER WORKING WITH THE MAN FOR A GOOD WHILE IT SEEMS YOU HAVE TO PROMOTE THE CAUSE OF MR.INNES.WHATEVER GOOD CAME OUT OF IT WAS INCIDENTAL.

INCIDENTALLY,MR.INNES DID DO GOOD THINGS TOO. HE WAS VERY ACTIVE AND HE WAS A MAN WHO MADE QUICK DECISIONS AND HE FOLLOWED THEM UP. SOMETIMES INCIDENTALLY,OTHER TIMES,QUITE FORCIBLY.

AS FAR AS I COULD SUMMARIZE WAS THAT THOSE TWO GUYS WERE A THORN IN HIS SIDE.HE EMPLOYED THE REASONS,AS I UNDERSTAND IT,WAS THAT EVERY BODY ELSE COULD BE EITHER CAJOLED OR THREATENED OR IN SOME WAY MADE TO SEE THINGS MR.INNES' WAY. AS I SAID,HE'S QUITE GOOD AT THAT.

HOWEVER,THESE TWO GENTLEMEN,MR.HIGHLAND MR.BECTON,IT WAS MORE DIFFICULT,BECAUSE WHATEVER WAS DONE THEY WOULDN'T FALL IN LINE OR POSSIBLY BRING IN OTHER MINORITY GROUP PEOPLE,IT WOULD BE MORE DIFFICULT TO DEAL WITH THEM BECAUSE ANYBODY ELSE COULD BE,YOU KNOW,FIRED,HIRED, WHATEVER CAN BE DONE.IT'S PART OF THE JOB,IT HAPPENS ALL THE TIME.

NOW,WHEN IT COMES TO BLACKS,THE IDEA IS THAT CHARGES COULD HAVE BEEN BROUGHT AGAINST HIM CORRECTLY OR POSSIBLY INCORRECTLY.BUT,THE CHARGES COULD HAVE BEEN BROUGHT.THAT,YOU KNOW, THE ANTI-MINORITY. SO,THE IDEA WAS THERE ARE OTHER WAYS THAT COULD MAKE HIS LIFE SO MUCH EASIER.

(THE FOLLOWING IS AN EXCERPT OF THE DIRECT EXAMINATION OF MR.BECTON,BY MR.TARNOW)

Q.DID THERE COME A TIME WHEN YOU HAD A MEETING WITH A MR.JOHNSON FROM THE ANTI-POVERTY PROGRAM ?

A. YES.

Q.WHAT WAS THE MEETING PURPOSE FOR ?

A.I TRIED TO GET MINORITY EMPLOYMENT AT SABENA AIRLINES.

Q.INCIDENTALLY,EVER SINCE THAT DATE HAVE ANY MINORITIES BEEN EMPLOYED BY SABENA ?

A.NONE.

Q.NOW,DURING THE COURSE OF YOUR EMPLOYMENT WITH SABENA AIRLINES,DID THERE COME A TIME WHEN YOU WERE LAID OFF OR DISCHARGED?

A. I WAS FIRED IN APRIL OF THIS YEAR.

Q. COULD YOU STATE THE CIRCUMSTANCES SURROUNDING THAT ?

A. I WAS FIRED BECAUSE I GAVE OUT A WRONG PIECE OF FREIGHT.

Q. BECAUSE YOU GAVE OUT A WRONG PIECE OF FREIGHT ?

A. RIGHT.

Q. AND TO THE BEST OF YOUR KNOWLEDGE HAVE OTHER PEOPLE GIVEN OUT WRONG PIECES OF FREIGHT ?

A. OF COURSE.

Q. AND ARE THEY FIRED FOR THAT ?

A. OF COURSE NOT.

Q. ARE THOSE OTHER INDIVIDUALS WHITE ?

A. YES.

Q. NOW,YOU FEEL CERTAIN,DON'T YOU,THAT THERE MUST HAVE BEEN SOME PEOPLE ALONG THE LINE WHO WERE FIRED FOR NEGLIGENCE OR WHATEVER, AREN'T YOU ?

A. NOT FOR GIVING OUT A WRONG PIECE OF FREIGHT.

Q. DESCRIBE WHAT HAPPENED ?

A. YES. THE TRUCK DRIVER CAME TO COLLECT A PIECE OF FREIGHT AND I INADVERTENTLY GAVE HIM THE WRONG PIECE OF FREIGHT. THE FREIGHT WAS-- THE VALUE WAS APPROXIMATELY $35. THE COMPANY GOT THE FREIGHT BACK IN TWO DAYS. BUT,IN THE MEANTIME I WAS FIRED.WHEN I CAME BACK I WAS SUSPENDED AND WHEN I CAME BACK TO WORK THAT TUESDAY,I WAS SUSPENDED. THEN AFTER A COUPLE OF DAYS LATER,I WAS FIRED, I WAS TERMINATED.THEY SAID, YOU KNOW,I WAS INCOMPETENT. I WAS NEGLIGENT AND THEREFORE I WAS NOT FIT FOR THIS JOB ANY LONGER.

Q. WHAT HAPPENED SUBSEQUENTLY ?

A. WELL,I WAS REINSTATED BY THE BROAD OF ADJUSTMENT, THE BROAD OF ADJUSTMENT CLAIMED THAT I WAS NOT -- I WAS NOT FIRED FOR SUFFICIENT CAUSE.

I WAS ABLE TO GET MY JOB BACK. BUT,I'VE BEEN CONSTANTLY HARASSED EVER SINCE 1969,1970.

AFTER THIS MEETING WITH DONALD GLYNN AT THE AIRPORT IN QUEENS,I WAS TRYING TO GET EMPLOYMENT FOR PEOPLE TO WORK FOR SABENA,THERE ARE ONLY TEN OUT OF A POPULATION OF APPROXIMATELY 130 AT KENNEDY ENTIRELY,THE CARGO AND TRAFFIC DEPARTMENT AND THERE HAVE NEVER BEEN ANY BLACK PEOPLE WORKING IN THE TRAFFIC DEPARTMENT AT SABENA AIRLINES.PROBABLY SINCE THE HISTORY OF SABENA AIRLINES AT JFK.

Q. WHAT DOES TRAFFIC MEAN ?

A. TRAFFIC IS A DEPT.THAT HANDLES THE PASSENGERS LEADING OFF AND LEADING ON.

MR.TARNOW: I HAVE NO FURTHER QUESTIONS.THANK YOU.

DEFENDANT SUBJECTED PLAINTIFF TO TAKE A LIE DETECTOR TEST IN FEB.1971 IMMEDIATLY AFTER PLAINTIFF FILED EEOC CHARGES AGAINST DEFENDANT. NO OTHER EMPLOYEE WAS EVER SUBJECTED TO A TEST OF THIS NATURE.

PLAINTIFF WAS WILLING TO COOPERATE WITH THE LIE DETECTOR AGENCY MR.KAUFMANN AND THE POLICE BY TAKING ANY TEST, AS MR.KAUFMANN TESTIFIED TO. ONLY WHEN DEFENDANT WANTED TO BE RELEASED OF ALL LIABILITIES DID PLAINTIFF BALK.
ONLY TWO DAYS PRIOR TO THIS INCIDENT DID PLAINTIFF FILE HIS EEOC CHARGE AGAINST DEFENDANT.

THE COURT BELOW ERRED, WHEN IT HELD; "SABENA DID NOT ITSELF ORDER OR REQUEST THE TEST "

MR.KAUFMANN TESTIFIED " I DON'T KNOW THE RELATIONSHIP BETWEEN THE POLICE AND THE AIRLINES, HOWEVER, I ALWAYS BILL THE CARRIER CONCERNED."

MR.KAUFMANN WOULD BE A POOR BUSINESSMAN IF HE PERFORMED SERVICES WITHOUT A GUARANTEE OF PAYMENT. IN THIS CASE, THE SECOND PARTY, THE POLICE, RELAYED THE REQUEST OF THE DEFENDANT, WITH THE GUARANTEE OF PAYMENT. IF DEFENDANT DID NOT ORDER OR REQUEST THE TEST, THAN ONE MUST ASK, WHY DID DEFENDANT DEMAND A RELEASE OF LIABILITY.

DEFENDANT CLAIMS IT HAS MADE SOME COMPLIANCE WITH PLAINTIFF REQUEST FOR MORE MINORITIES, DEFENDANT HAS NOT HIRED ANY BLACKS SINCE 1970. EVERY YEAR FOR THE PAST TEN YEARS DEFENDANT HAS HIRED SUMMER EMPLOYEES FOR THE SEASON, NONE OF THESE WERE MINORITIES.

IN U.S. v. BETHLEHEM STEEL CORP.

446F.2d. 652 (2nd CIR. 1971)

THE COURT FOUND THAT THE DEFENDANTS HAD ENGAGED IN A WIDE RANGE OF DISCRIMINATORY PRACTICES INCLUDING RACIAL HIRING AND ASSIGNMENT FOR MANY YEARS PRIOR TO THE EFFECTIVE DATE OF THE ACT, AND THAT MANY OF THESE PRACTICES WERE MAINTAINED AFTER TITLE VII BECAME OPERATIVE.

THE SUPREME COURT HAS CLEARLY INDICATED THAT THE CONTINUING EFFECTS OF PAST DISCRIMINATION ARE VIOLATIONS OF TITLE VII.

LOUISIANA v. U.S., 380 U.S. 145, 154 (1965), BY FAILING TO INSURE THAT "ONCE THE FORMAL PROCEEDINGS HAVE ENDED THE UGLY FACE OF BIAS DOES NOT REAPPEAR."

ARGUMENT

I. THE FACTUAL ALLEGATIONS OF THE PLAINTIFF AS SET FORTH IN THE AMENDED COMPLAINT AND AS CONSTRUED BY THE COURT BELOW, SUFFICIENTLY STATE CONTINUING VIOLATIONS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. §2000e .SO AS TO RENDER A PERMANENT INJUNCTION AGAINST THESE VIOLATIONS.

SUMMARY OF ARGUMENT

RECENT DECISIONS OF THE UNITED STATES SUPREME COURT AND OF THIS CIRCUIT CONSTRUING TITLE VII ESTABLISH THAT THE PLAINTIFFS' CLAIMS STATE A CAUSE OF ACTION UNDER THE ACT UPON WHICH RELIEF MAY BE GRANTED. THE PLAINTIFF HAS ALLEGED THAT THE DEFENDANT COMPANY HAS NEVER ABANDONED ITS POLICY OF DISCRIMINATION AGAINST BLACKS. IT IS NOW 12 YEARS AFTER THE EFFECTIVE DATE OF TITLE VII, DEFENDANT HAS ONLY FOUR BLACKS OUT OF A TOTAL OF 119 EMPLOYEES AT KENNEDY AIRPORT. THE FOUR WORK IN THE LOWEST DEPARTMENT OF THE COMPANY, THE CARGO DEPARTMENT.

PRIOR TO TITLE VII NO BLACKS WORKED FOR DEFENDANT AT KENNEDY AIRPORT.

PLAINTIFF HAS NEVER MADE INFERENCE TO ANY FINANCIAL GAIN IN HIS ACTION AGAINST THE DEFENDANT.
PLAINTIFF HAS FROM THE OUTSET MAINTAINED THIS ACTION AS ONE OF EQUITY.DEFENDANT (ex.A-I) CLEARLY STATES IN A SWORN AFFIDAVIT BY PLAINTIFF.....TO EEOC.....

"I ONLY DESIRE A CHANGE OF POLICY IN HIRING WITH U.S.GOVERNMENT SUPERVISION AND PROMOTIONAL CONDITIONS EQUAL TO ALL EMPLOYEES.ALSO UNNECESSARY QUALIFICATIONS FOR PROMOTION.

DEFENDANT MAKES INFERENCE TO A MILLION DOLLAR LAWSUIT BY THE PLAINTIFF,THIS IS ANOTHER PRETEXT TO TRY AND DISCREDIT THE PLAINTIFF.

ONE WILL NOTE ALL OF THE REPRISALS BY THE DEFENDANT TO THE PLAINTIFF WERE PRECEEDED BY AN INCIDENT.

MAY 17,1971 NYSHRC RULED NO PROBABLE CAUSE
MAY 19,1971 PLAINTIFF GETS TELEGRAM OF SUSPENSION
MAY 15,1972 PLAINTIFF GETS FALSE UNION SUSPENSION
MAY 18,1972 DEFENDANT DISCHARGES PLAINTIFF

DEFENDANT HAS DISCRIMINATED AGAINST BLACKS IN HIRING AND RECRUITMENT PRACTICES.DEFENDANT HAS TRADITIONALLY ASSIGNED AND CONTINUES TO ASSIGN WHITE PERSONS TO JOBS WHICH OFFER BETTER OPPORTUNITIES FOR TRAINING AND ADVANCEMENT,WHILE ASSIGNING BLACKS TO LESS DESIRABLE JOBS SUCH AS CARGO WORKERS,WHO ARE LOCKED INTO THE SENIORITY SYSTEM.

THE ACTS AND PRACTICES OF THE DEFENDANT CO. CONSTITUTE A PATTERN AND PRACTICE OF RESISTANCE TO THE FULL ENJOYMENT OF THE RIGHTS OF BLACKS AND OTHER MINORITIES TO EQUAL EMPLOYMENT OPPORTUNITY.

UNLESS RESTRAINED BY ORDER OF THIS COURT, THE DEFENDANT WILL CONTINUE TO ENGAGE IN ACTS AND PRACTICES THE SAME AS OR SIMILAR TO THOSE ALLEGED IN THE COMPLAINT.

DEFENDANT HAS FAILED TO PROMOTE BLACKS TO HIGHER RATED NON-UNION POSITIONS IN LINE OF PROGRESSION, WHERE WHITE EMPLOYEES WITH SIMILAR OR LESS QUALIFICATIONS HAVE BEEN PREVIOUSLY PROMOTED TO SUCH POSITIONS.

WHILE CONSIDERING THE 1964 AMENDMENTS TO TITLE VII CONGRESS FOUND:

" IN 1964, EMPLOYMENT DISCRIMINATION TENDED TO BE VIEWED AS A SERIES OF ISOLATED AND DISTINGUISHABLE EVENTS, FOR THE MOST PART DUE TO ILL-WILL ON THE PART OF SOME IDENTIFIABLE INDIVIDUAL OR ORGANIZATION.....

EMPLOYMENT DISCRIMINATION, AS VIEWED TODAY, IS A FAR MORE COMPLEX AND PERVASIVE PHENOMENON. EXPERTS FAMILIAR WITH THE SUBJECT GENERALLY DESCRIBE THE PROBLEM IN TERMS OF 'SYSTEMS' AND 'EFFECTS' RATHER THAN SIMPLY INTENTIONAL WRONGS, AND THE LITERATURE ON THE SUBJECT IS REPLETE WITH DISCUSSIONS OF, FOR EXAMPLE, THE MECHANICS OF SENIORITY AND LINES OF PROGRESSION, PERPETUATION OF THE PRESENT EFFECTS OF PRE-ACT DISCRIMINATORY PRACTICES THROUGH VARIOUS INSTITUTIONAL DEVICES, AND TESTING AND VALIDATION REQUIREMENTS. IN SHORT, THE PROBLEM IS ONE WHOSE RESOLUTION IN MANY INSTANCES REQUIRES NOT ONLY EXPERT ASSISTANCE, BUT ALSO TECHNICIAL PERCEPTION THAT A PROBLEM EXISTS IN THE FIRST PLACE, AND THAT THE SYSTEM COMPLAINED OF IS UNLAWFUL"

(S.REP.No.91-1137, 91st CONG:, 2d SESS. 15 (1970)

IN ITS CONCLUSION THE COURT STATED: [1]

"THE FAILURE TO DO ANYTHING ALONG THOSE LINES AFTER THE EEOC DETERMINATION, HARDLY LEAVES THE MATTER IN A SATISFACTORY POSTURE FROM THE POINT OF VIEW OF SABENA OR ITS EMPLOYEES."

A FINDING IS CLEARLY ERRONEOUS UNDER RULE 52(a)

"WHEN ALTHOUGH THERE IS EVIDENCE TO SUPPORT IT, THE REVIEWING COURT ON THE ENTIRE EVIDENCE IS LEFT WITH THE DEFINITE AND FIRM CONVICTION THAT A MISTAKE HAS BEEN COMMITTED."

UNITED STATES v. UNITED STATES GYPSUM CO.

333 U.S. 364, 395 (1948);

CAUSEY v. FORD MOTOR CO.

516 F.2d 416, 420-21 (5th CIR. 1975)

STEWART v. GENERAL MOTORS CORP.

542 F.2d 445, 449 (7th CIR. 1976)

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[1] OPINION OF THE COURT BELOW

THE COURT BELOW ERRED WHEN IT HELD.[1]

"BUT NO EFFORT HAD BEEN MADE TO PUT PLAINTIFF UNDER SURVEILLANCE AND, THEREFORE, SABENA COULD NOT SUPPORT ITS CONTENTION AT THE ARBITRATION WITH ANY EVIDENCE AND IT LOST THE ARBITRATION"

DEFENDANT STATES IN HIS REPLY BRIEF [2]

"PLAINTIFF HAD BEEN UNDER SURVEILLANCE BY REASON OF HIS POOR ATTENDANCE RECORD"

THE COURT ALSO STATES. [3]

" THE EEOC DETERMINATION IS STRENUOUSLY ADVERSE TO SABENA"

IN THE COURT OPINION FOR THAT SAME REPORT IT HELD. [1]

" THE FINDINGS IN IT APPEAR TO PERVERSE AND AT WAR WITH THE TOTAL RECORD "

1/ OPINION OF THE COURT BELOW

2/ DEFENDANT REPLY BRIEF SUPPLEMENTAL INDEX (15)

3/ MEMO AND ORDER, DENYING THE MOTION FOR DISMISSAL

CONCLUSION

FOR THE REASONS SET FORTH ABOVE, THE DECISION OF NOV. 19, 1976, OF THE COURT BELOW SHOULD BE REVERSED IN ALL RESPECTS, AND GRANT THE RELIEF REQUESTED IN THE COMPLAINT.

RESPECTFULLY SUBMITTED,

ROBERT H. HIGH - PRO SE
111-12 CORONA AVE.
CORONA, N.Y. 11368
(212) 271-4157

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

ROBERT HIGH,

Plaintiff,

-against-

SABENA BELGIAN WORLD AIRLINES,

Defendant.

: 76 C 1730
: MEMORANDUM INCORPORATING
: FINDINGS of FACT
: and
: ORDER for JUDGMENT

- X

Appearances:

HERMAN H. TARNOW, Esq., for plaintiff

RONALD H. COHEN, Esq., for defendant

DOOLING, D.J.

Plaintiff by his amended complaint sues under 42 U.S.C. §§ 1981, 2000e-2(a)(1) and 2000e-3(a). He seeks an adjudication that defendant's policies, practices, customs and usages are violative of Section 1981, an injunction against continuing discrimination against plaintiff and an order requiring the adoption of an affirmative action program by defendant covering testing, advancement, fair assignment and overtime matters; plaintiff also prays for back pay for the deprivation of his right to equal employment, and attorney's fees plus plaintiff's own costs.

Plaintiff is a black native born citizen of the United States. He completed high school education, and completed two years of college work at Boston University. His application for admission to the Portia Law School was accepted, but plaintiff was unable to attend for financial reasons. Plaintiff worked for Northeast Airlines in the Boston area, thereafter worked for Air Canada, and since 1968 has been employed by defendant. Plaintiff removed to New York, and first worked with Air Canada in New York.

Plaintiff was employed by defendant Sabena on September 26, 1968, as a warehouseman, or warehouse service man, and he is still employed in that capacity. Plaintiff does not complain about his level of compensation within his present job classification nor does he claim that he has been discriminated against in that respect. His complaint is rather that a series of incidents over a long period of time indicates a pattern of discrimination against him and other blacks in respect to hiring, promotion and tenure. So far as his own case is concerned, he emphasizes that the succession of incidents, taken both individually and for their cumulative effect,

characterizes the true work-situation.

Plaintiff points out in the first place that the ratio of blacks to all others employed at the Sabena facility at John F. Kennedy International Airport (hereafter JFK) is far below the ratio of blacks to all others in the population in this area. After plaintiff had been at Sabena for some time another black man, Frederick Beckton, was employed as a cargo warehouseman or cargo serviceman on about January 19, 1969, and he, like plaintiff, considered that there were not a representative number of blacks employed at Sabena. Accordingly plaintiff and Beckton arranged with the personnel manager of the facility, Donald Glynn, to have a meeting with a Mr. Johnson, who was identified with the Jamaica Anti-Poverty Program. The meeting took place the latter part of 1970. As a result of the meeting Mr. Glynn indicated a willingness to make an effort to employ more blacks as opportunity arose, and in that connection to get in touch with Mr. Johnson as vacancies occurred to see if Mr. Johnson could recommend to Sabena men with suitable qualifications.

Neither plaintiff nor Mr. Beckton have ever thought that anything at all came of this meeting. Mr. Glynn on the other hand points out that there were some hirings in compliance

with the idea expressed at the meeting, but that a radical reduction in force at Sabena, which diminished the number of jobs by very nearly half, resulted in the layoff of the ten or eleven persons who had been hired after the time of the meeting with Mr. Johnson. The final result was that there was no improvement of the kind that plaintiff and Mr. Beckton sought. There is no basis, however, for a finding that the absence of improvement reflected active discrimination on the part of Sabena, unless discrimination was implicit in the composition of the work force. The evidence compels the conclusion that in this area there was no overt discrimination and no expression of discriminatory sentiment on Sabena's part.

A second aspect of the activity in connection with the Johnson meeting appears to have been that it identified plaintiff and Mr. Beckton as black activists. It is an easy inference from the evidence that in the period from the time of the meeting until June 1974, while plaintiff and Mr. Beckton were working under James L. Innes who was the cargo manager, Mr. Innes was aware of plaintiff's supposed attitude as an activist and dealt with him with that very much in mind. The inference is that Innes recognized that he had to proceed carefully where the plaintiff was concerned, and make sure

that nothing that he did was interpreted by plaintiff as discriminating against him by reason of his race and color. Mr. Innes, quite correctly, thought that plaintiff was over-qualified for the kind of work that he was doing, and that for that and other reasons, he was difficult to supervise and had a tendency to insubordination and to general difficulty in his job relationships. As the witness Krueger made clear, Mr. Innes no doubt tended to treat as intransigence what to plaintiff was simply a proper self-respect and insistence upon his own rights and those of other blacks. But there is no ground for finding and it is not found that Mr. Innes discriminated against plaintiff because he was a black or because the rights which he pressed upon management were those of black men. The black issue was the occasion of plaintiff's obduracy but it was plaintiff's attitude, and not what occasioned it, that created friction on the job.

Some time in the fall of 1970 plaintiff complained that he had been passed over in assignments for overtime work, and he made this the subject of a grievance on which he prevailed. Again there is no indication that the passing over of plaintiff had anything to do with his race. He appears to have proceeded promptly and correctly through Union channels to get the

grievance adjusted.

As indicated above, plaintiff has a good deal of education for the kind of work that he is doing, and he aspired in 1970 to promotion to the next higher rank in the work at the Sabena facility. That work, that of Cargo Agent, required a good deal of paper handling. The job is described in Article III, Section 2 subdivision b of the Collective Bargaining Agreement between Sabena and the Transport Workers Union of America, and the qualifications for the job are contained in Article IV, Section 1, subdivision b. A Cargo Agent under the Union contract must, among other job qualifications, possess a high school education or its equivalent, be qualified for bonding, and must be able to type at least 45 words per minute. Plaintiff tried to pass the typewriting test, but failed it. He was not able to type any faster than about 33 or 34 words a minute. For that reason he was not advanced to Cargo Agent and is still in his original job classification of warehouseman or cargo serviceman.

There is no basis for finding that the job qualification was adopted for the purpose of excluding any class, that the test was unfairly administered to plaintiff, or that his failure to pass the test and qualify for the work had any basis in

racial discrimination. Frederick Beckton did qualify for the job and he served as a Cargo Agent until, in a very substantial reduction in work force, he was downgraded to warehouseman under seniority rules. Omee Jones, who is also black, is a Cargo Agent. Because of the substantial force reduction there has been no new opportunity to try for the Cargo Agent rank. The evidence refutes the suggestion that blacks were discriminated against in the matter of promotion to the classification of Cargo Agent.

In late November 1970 five cartons of knitwear from Blye International were lost, and, apparently, plaintiff, among others, was suspected of having a part in the theft of the merchandise. After a considerable lapse of time plaintiff was in effect instructed to cooperate with the police. In that connection the police took him to a place at which he was to be subjected to a lie detector test. Apparently under the mutual security arrangement prevailing among the airlines, lie detection tests are administered to airlines personnel, and the cost of lie detection tests is billed to the airline which is involved. In the case of the Blye loss Sabena was the one expected to pay for the lie detector test. Sabena did not itself order or request the test, but no doubt Sabena understood that the police might routinely expect a test to be

tuken. The plaintiff, however, did not actually complete the test and no polygraph readings apparently were ever taken. The reason was that plaintiff declined to sign a release of Sabena, although he was willing to sign a release of the organization administering the test and its representative, Victor Kaufman. When plaintiff declined to sign the release, Kaufman communicated with Sabena, and Sabena declined to have the test proceed without the release.

Again the episode had nothing to do with plaintiff's race. He was not suspected because he was black nor sent to take a polygraph test because he was black. The indications are that an undisclosed informer was responsible for his implication.

In an effort to curb thefts of cargo from the airport, particularly in connection with interline transfers of freight at JFK, Mr. Innes of Sabena initiated the idea of checking up on the Sabena operation by putting an extra, unrecorded package into the interlining truck as a check-piece. The idea was that an honest driver would return the extra piece and report it as extra, but that a dishonest man, finding the extra piece on his truck, would not return but would steal it, on the assumption that it was unrecorded - not listed to his truck.

On one occasion such a package was placed in plaintiff's truck. Plaintiff of course found it "extra," and returned it at the end of the job to its proper place in the Sabena warehouse. He did not, however, report it in to the office, and an incident followed. Nothing came of the incident, and it was apparently dropped after the usual logomachy.

Plaintiff contends that the putting of the extra package in his truck was a deliberate attempt to entrap him, and again ascribed it to discrimination against him by reason of his race. The check package technique of testing the drivers may have been ill-advised but it could hardly be a means of entrapping anyone, and there is no indication that plaintiff was singled out as suspicious or as someone who, whether or not suspicious, might do something that would create an opportunity for disciplining or discharging him. The evidence on the subject is sparse, but, again, there is no evidence that could support an inference of racial discrimination.

The most controversial and long drawn out of the disputes between plaintiff and Sabena turned about plaintiff's record of absences, the disciplinary action taken by Sabena, plaintiff's prosecution of his grievance remedies under the Collective Bargaining Agreement between Sabena and TWU, and

plaintiff's ultimate reinstatement with back pay. For present purposes the fact that plaintiff received total indemnification must be laid to one side. It might despite that fact remain true that the episode reflected an animus against plaintiff by reason of his color or race.

The Collective Bargaining Agreement provided, with respect to "Paid Sick Leave," that employees with more than three months but less than five years of service were permitted up to thirty days annual sick leave with pay and that employees with more than five years of service would be permitted forty-five days annual sick leave with pay. Plaintiff, as appears from his date of employment, came within the thirty days per annum provision. The Collective Bargaining Agreement is clear that sick leave is not cumulative from year to year. It is also noted that by a letter of February 4, 1970, it was agreed between Sabena and TWU that letters of reprimand or disciplinary action in an employee's personnel file would be effective for twelve months from date of issue only, and that letters of reprimand should be clearly so marked.

The record with respect to plaintiff's absences starts with a memorandum, a copy of which went to plaintiff, dated June 29, 1970, which states truly that his absences had been

discussed with the plaintiff in previous years and that, although plaintiff showed thirty-five and a half days of absence in 1969, he was given an opportunity to improve his position. Notwithstanding that, the plaintiff had been absent in the first half of 1970 sixteen and a half days; said the memorandum -

> "Attendance is the only area of an employee's performance where history of past years cannot be overlooked or excluded in evaluation."

The memorandum continued with a recommendation that plaintiff's sick leave privileges be forthwith suspended, and that, if his absence record continued, the plaintiff should be terminated. The memorandum concluded

> "We would welcome the opportunity to discuss the matter further with the employee if he so desires."

Nevertheless at the year end, December 24, 1970, the new personnel manager, J.L. Innes, referred to above, prepared a memorandum on the subject of plaintiff's absences showing absences occurring on twenty-nine different days, some of which were total days of absence and others of which appear to have been absences from duty of various lengths from an hour and thirteen minutes to six hours and thirty-two minutes. On the basis of his computation of plaintiff's absence record Mr. Innes

recommended plaintiff's discharge.

Plaintiff was not discharged at the end of 1970 but apparently was given a further, and sharp warning. Again under date of May 21, 1971, plaintiff's absence record was called into question, and a telegram suspending him from duty was despatched to his residence. There is a controversy, unimportant for present purposes, about whether or not plaintiff received the telegram. It would appear that, if he did not, it was by reason of the fact that he had not kept his address records clear with the company. In any case he learned of the telegram before disaster overtook him. A meeting followed at which the shop steward was present along with plaintiff and representatives of Sabena. Plaintiff took the position that his absence record had been considerably improved. Sabena took the view that he had been absent on 34 days in 1970, 11 of them "in conjunction with his scheduled days off," that he had been late 36 times without any explanation, and twice had failed to send the company proper notice of the occasion of his absence from duty because of illness. In 1971, the company asserted, plaintiff had taken eight days of sick leave, three of them in conjunction with his scheduled days off, and had been late eight times without any explanation. Plaintiff

was advised that if he was absent again before his Leave of Absence, effective July 1st, commenced he would be terminated. After the meeting Mr. Innes sent to plaintiff, under date of May 21, 1971, with copies to the two Union representatives who had attended the meeting with plaintiff, a notice concluding

> "... I took it upon myself to give you a final chance to keep your absentee record clear but I confirm the verbal warning which was given to you in the last meeting, that:
>
> "SHOULD YOU BE ABSENT AGAIN PRIOR TO YOUR LEAVE OF ABSENCE WHICH IS EFFECTIVE JULY 1st, YOUR SERVICES WOULD BE TERMINATED IMMEDIATELY WITH SABENA BELGIAN WORLD AIRLINES."

A suspension, the precise duration of which is not indicated, but which was not very long, followed the sending of the telegraphic notice referred to in the May 21 meeting.

Toward the end of the year, and by a written determination dated December 15, 1971, plaintiff was suspended for 3 working days on the ground that he had directly disobeyed an order. The determination signed by Mr. Innes stated among other things

> "Conduct of this nature cannot and will not be tolerated. Disobedience under ARTICLE XXI of the existing contract, is grounds for discharge. This plus your past record of absenteeism and lateness would normally result in your immediate dismissal. The only mitigating circumstance is your attempt in the last three months to improve your past record. In

> my letter of May 21, 1971, wherein I confirmed your disciplinary suspension, I gave you a final chance to redeem your job. I cannot indefinitely continue to to give you final chances."

In May 1972 plaintiff was again charged with excessive absenteeism. Sabena claimed that there were 9 absences from January to the date of termination (May 18, 1972) in addition to those recorded for previous years. The action was necessarily taken under Article XIV, "Absence from Duty," Section 1 of which Article provides

> "An employee hereunder shall not be absent from duty without prior permission, in writing, except for reason of sickness, injury or other justifiable cause beyond the control of the employee."

And Article XXI, "Discipline and Discharge," Section 1 provides

> "It is understood that the Company has the right to discipline or discharge an employee for incompetency, disobedience, dishonesty, disorderly conduct, negligence, absenteeism or any just and sufficient cause."

As a result of the absenteeism charged, plaintiff was discharged effective May 18, 1972. Plaintiff thereafter exhausted all of his remedies within the company through regular grievance channels, and then took the case to arbitration. He prevailed. An arbitrator's opinion and award,

rendered as of and effective December 15, 1972, concluded that plaintiff had not been discharged for a just cause. The relief granted was

> "It is therefore awarded that the Grievant, Robert High, be restored to his position with full seniority rights, and with back pay, less any earnings or Unemployment Insurance or other benefits that he may have received from the date of his discharge to the date of restoration to duty."

Plaintiff was of course restored to duty with back pay as directed. He has continued in Sabena's employment to the present time. His overall record of employment shows that he was first engaged as a warehouseman at $456 a month in 1968 and effective in October 1976 was receiving $1,274 per month.

The question is not whether plaintiff's discharge was unjust, but whether he was discharged because of his color or race. The conclusion must be that he was not. Sabena's position with reference to absenteeism was one that, as it turned out, was impossible to sustain for lack of proof. There was no possibility of saying that plaintiff had taken more days for sick leave than the contract had entitled him to. Sabena's contention was, rather, that he was abusing sick leave, and that this could be drawn as an inference of fact from the

pattern of his one and two day absences, and from the frequency with which those one and two day absences followed or preceded paid holidays. The difficulty in plaintiff's particular case, from Sabena's point of view, was that on each absence occasion plaintiff assigned sickness as the reason for his absence and that on his partial absences he left the job sick. Hence Sabena had to contest the truthfulness of plaintiff's sickness excuses, and it had no evidence with which to challenge plaintiff's candor except the coincidence of days of absence with paid holidays. Sabena has suggested that part of the problem was that they could not as a practical matter run any effective check on plaintiff, because, his first marriage having ended, his reported addresses and home telephone numbers were not always up to date. But no effort had been made to put plaintiff under surveillance, and, therefore, Sabena could not support its contention at the arbitration with any evidence, and it lost the arbitration.

Plaintiff argues, and perhaps felt, that he was being singled out because of his race or color. But certainly the evidence that he has presented does not suffice to support an inference of discrimination. Two others, Michael Roveccio and Gerard Young were charged at the same time that plaintiff was

charged. Both were white men. In the case of Gerard Young, the arbitrator sustained the discharge as just and based on sufficient cause. In the case of Roveccio, he decided, as in plaintiff's case, that discharge was not warranted and that reinstatement with back pay was required. There were others who were at one time or another terminated, and then reinstated but only after serious disciplinary losses. These included Cantelmo, Ficten and Lippo, none of whom was a black man.

It is true as plaintiff points out that the roster of all employees and their sick days and late days for the first half of 1972 shows a number of others who might have been charged at the same time that Roveccio, Young and plaintiff were charged. But the evidence did not and perhaps could not go into the circumstances of each of the recorded absences. Again the question would have been whether the pattern of absences of the other men could reasonably be thought, as it was thought in plaintiff's case, to suggest that the sick leave was being abused rather than simply used.

Other matters were brought up which are not of moment but throw a side light on the troubled employment relationship. On various dates over the years from late 1969 through the first part of 1976 income executions were served on Sabena

with respect to plaintiff's compensation. These were by various creditors including Beneficial Finance, Household Finance, First National City Bank and American Express. And at the end of 1975 the Internal Revenue Service filed a notice of levy on Sabena with respect to plaintiff's 1973 income tax. In July 1975 Sabena undertook to issue a letter of warning to plaintiff stating that he was warned that, if the Company again was served with a garnishment, wage assignment or other process attaching his salary, the Company would take appropriate disciplinary action. Plaintiff had no difficulty in putting Sabena in its place in light of the provisions of NYCPLR Section 5252. It turned out that the Internal Revenue Service levy was a mistake on the part of the Internal Revenue Service and that there had been no tax delinquency on plaintiff's part.

In another such incident, plaintiff in about the early part of January 1972 reported to Mr. Innes that a senior agent (Palmento) on his shift was allowing and participating in gambling on Company premises. Plaintiff's objection was that the foregathering of the other men on the shift to play cards in the senior agent's office left him alone to do substantially all the work for the period involved. Mr. Innes

investigated. He found, rightly or wrongly, that no "gambling" was going on. He found, however, that Palmento did engage in card playing in the senior agent's office and stated that such conduct could not be permitted. The memorandum stated that An Immediate Action Bulletin was being published advising that card playing on Company premises was prohibited and that participation in it would subject the man to disciplinary action. Palmento was instructed to make sure that card playing did not again occur on his tours of duty.

This episode is entirely colorless on the issue of discrimination, but it could be thought to have some effect on the ease of plaintiff's relation with his fellow employees.

Finally there is the question of the prize trips. Apparently at the time of annual Christmas parties, airline trips, not necessarily those of Sabena alone, are in effect raffled off during the Christmas parties. Plaintiff appears to complain that when he won one such trip, the air transportation was properly awarded to him but he was denied the land accomodations, which he understood to be a part of the prize. However, it does not appear that Sabena was responsible for plaintiff's failure to receive the land part of the award. There is no evidence of any kind to suggest

that there was anything either personal or connected with race or color involved in the Christmas award of foreign travel.

Two other matters were mentioned, a communication with respect to an Australia trip and the alleged requirement that plaintiff prove his marriage, a requirement allegedly not imposed in the case of white employees. Neither of these has any foundation in merit. The Australia matter seems to have been based on an absurd misapprehension on one or the other or both sides about the connection of a trip to Australia with time off. The alleged proof of marriage matter arose out of plaintiff's request for transportation to Mexico with his prospective second wife before they were married. Under understandable practice, employee travel privileges extended only to the employee and the members of his family, and a prospective wife was not regarded as in that classification. It is unclear and unimportant whether or not later plaintiff did receive transportation for himself and his second wife after he produced their marriage certificate.

Upon all of the evidence it cannot be found that Sabena discriminated against plaintiff by reason of his race or color or by reason of his activitism on behalf of blacks and Black

employment. Plaintiff is patently a man of principle and determination, and his make-up does not permit him to be a submissively good servant. He need not be. Like any man, however, who works against the grain, he cannot expect his own way to be easy nor does he make the way of his employer easy. Nevertheless it is an easy inference that it is good for Sabena to have an activist like plaintiff in their employment, and, probably, they are overall better off for having plaintiff there as a constant reminder of their obligations under the law. But the present record is not satisfactory as a basis for determining whether or not Sabena, at least in the warehouse operation at JFK, should be required formally to institute an affirmative action program under a regularly appointed affirmative action officer. The failure to do anything along those lines after the EEOC determination hardly leaves the matter in a satisfactory posture from the point of view of Sabena or of its employee.

The EEOC determination of January 29, 1975, has been considered. The findings in it appear to be perverse and at war with the total record.

Finding that plaintiff has failed to sustain his

burden of proof it is

ORDERED that defendant have judgment and that the Clerk enter judgment that plaintiff take nothing and that the action is dismissed on the merits without costs.

Brooklyn, New York

November 19, 1976.

U. S. D. J.

ROBERT HIGH vs. SABENA BELGIAN WORLD AIRLINES

DATE	NR.	PROCEEDINGS
10-23-75		Complaint filed. Summons issued. (1)
11-14-75		Summons ret and filed/executed. (mg) (2)
12/2/75		ANSWER of deft filed. (3)
1/7/76		Copy of Order dated 1/7/76 filed By Dooling that a conference will be held on 1/22/76 at 9:15 A.M. (4)
1-22-76		Before DOOLING,J. -Case called, amended complaint due 2-6-76, motions due 3-5-76.
2-5-76		Byfore DOOLING,J.- Order that plaintiff submit an amended complaint by 2-6-76 and that the deft. motions in response be submitted by 3-5-7 filed. (5)
3-22-76		Notice of motion ret. 3-31-76 to dismiss etc., filed. (6)
3-23-76		Supp. affidavit of Ronald Cohen filed. (7)
3-30-76		Amended complaint filed. (8)
3-30-76		Affidavit in opposition filed. (9)
4-26-76		By DOOLING,J.-Memorandum & Order dtd 4-22-76 that deft's motion to dismiss for lack of jurisdiction is denied. (10)
5-6-76		Answer to amended complaint filed. (11)
10-12-76		Before DOOLING,J.- Case called for trial. Trial ordered and begun. and cont'd to 10-13-76
10-13-76		Before DOOLING,J.- Case called for trial. Trial resumed. Pltff rests. Defts moves for dismissal of the complaint. Decision reserved. Deft rests. Trial concluded. Decision reservdd. Briefs to be submitted by 11-3-76 and reply if any by 11-10-76
10-29-76		Sten. transcript dtd 10-13-76 filed. (12)
11-8-76		Pltff's post trial memo of law filed. (13)
11-8-76		Post trial memo of deft Sabena Belgian Wordl Airlines filed. (14)
11-16-76		Deft's reply memo filed. (15)
11-17-76		Pltff's post-trial memo of law filed. (16)
11-17-76		Letter dtd. 11-4-76 from R. Cohen to H. Dooling re: copies of exhibits attached filed. (17)
11-20-76		By DOOLING, J. - Memorandum incorporating Findings of Fact and Order for Judgment dtd 11-19-76 directing Clerk to enter judgment dismissing the complaint filed(p/c mailed to parties). (18)
11-22-76		Judgment that the pltff take nothing of the deft and that the action is dismissed on the merits without costs filed. (19)
12-7-76		Notice of appeal filed. copy mailed to the C of A. (20)
1-3-77		Civil appeal scheduling order filed. (21)

ROBERT HIGH

PLAINTIFF.

- against -

SABENA BELGIAN WORLD AIRLINES,

DEFENDANT.

NOTICE OF APPEAL

Civil Action No.

76 C 3780

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK
CLERK
7 12 45 PM '76

NOTICE is hereby given that ROBERT HIGH hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this proceeding on the ~~6th~~ 22nd day of ~~November~~ DECEMBER, 19 ~~76~~.

Dated: Brooklyn, New York
DEC. 6, 1976

ROBERT HIGH
name

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